STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD LEE FERGUSON,

Defendant-Appellant.

UNPUBLISHED
June 12, 2003

No. 237888
Kent Circuit Court
LC No. 01-000580-FH

Before: Smolenski, P.J., and Cooper and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree retail fraud. MCL 750.356c. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to three to fifteen years' imprisonment. Defendant appeals as of right, and we affirm.

Stephanie Hall testified that she went with defendant to the Wal-Mart store in Cascade, Michigan, on December 30, 2000, with the intent to steal a computer. The computers were located in the center aisle, next to the clothes. Initially, Hall testified that she put clothes into her basket, and defendant arrived with the computer in his own cart. Hall then testified that she had to assist defendant with lifting the computer into his basket. It was defendant's idea to steal the computer. Hall did not want to steal the computer because she thought they would "get caught sooner or later." They approached the cash registers. Defendant took the cart with the clothes. They paid for the clothes, but the cashier did not say anything about the computer. As the couple exited the store to go to the parking lot, store detectives stopped them. The store detectives advised Hall that defendant denied even knowing her. Without any promises of leniency, Hall gave a statement regarding prior instances of shoplifting with defendant.

Hall testified that she drove with defendant to the Wal-Mart store in Plainwell, Michigan on December 23, 2000, because they were given information that it was easy to steal from that store. Hall could not recall what they had in their cart, but they were confronted as they exited the store. Hall indicated that she was going to get the receipt from her husband, but left the cart and walked out of the store. Hall could not recall specific details because of drug use during that period of time. Hall further testified that the couple's method of operation involved the theft of computers, DVD players, stereos, and televisions from four different Wal-Mart stores. Wal-Mart had a separate electronics department in the middle of the store where merchandise could be purchased. When a customer went through the front check out lane, it was usually assumed that the electronic merchandise had been purchased in that department. If the couple was not

stopped at the exit door, the merchandise was obtained for free. Hall would debate with defendant who would push the merchandise out of the store because she was scared. The couple took turns pushing the stolen merchandise out of the store.

On cross-examination, Hall admitted that she gave different accounts regarding her activities with defendant. Hall initially gave an account that she returned to Grand Rapids with defendant after the December 23, 2000 incident. She later stated that she went to a hotel in Big Rapids with defendant. Hall attributed any disparity between her testimony and prior statements to the lapse in time and the difficulties she experienced at that time, which included drug use. Hall testified that she was brought to court on a material witness warrant and pleaded guilty to retail fraud for this incident. However, she received immunity from prosecution regarding the other incidents of theft at Wal-Mart that she testified to at trial. Hall admitted having items tucked under her sleeve when taken into custody at Wal-Mart, including two bras and a slip. She testified that the items belonged to her, but she did not have a purse to carry the items. Hall admitted that she had a son, but denied that the computer was a Christmas gift for her son. Defendant wanted to steal the computer to obtain money to go to Mount Pleasant for his birthday, which was on New Years' Eve. She testified that the items stolen were purchased by drug dealers or other individuals for half the retail value.

Hall testified that defendant did not smoke cigarettes or marijuana, but he did smoke crack cocaine from a small cylinder pipe. Hall also testified to observing a threat by defendant. When she was brought into the police station on the material witness warrant, defendant went past Hall on the other side of a glass partition. Defendant made a verbal threat and a gun-like gesture. Hall denied that she was wearing defendant's clothing when taken to the police station.

On December 23, 2000, Amy Ewing, a Wal-Mart employee from the Plainwell store, observed a woman trying to exit the store with a computer. A pink security sticker was placed on items that were purchased. There was no pink security sticker on the computer. Ewing spoke to the woman on two occasions, but she did not respond. Ewing touched the woman's arm and indicated that the receipt needed to be presented. The woman stated that her husband had the receipt in the parking lot. Ewing directed the woman to go and get the receipt because the merchandise would not leave the store until it was produced. The woman turned around and went back into the store. Ewing pointed the woman out to Fisher. The woman later asked if she could leave the computer by the registers while she went to get her husband. Ewing told the woman that the computer could not leave until the receipt was produced. Ewing never saw the woman again and could not identify the woman she saw on December 23, 2000.

On December 30, 2000, Brian Rupp, a surveillance employee of Wal-Mart since December 1998, was being retrained by David Fisher. Fisher observed two suspects in the men's department. Fisher recognized Hall from an incident at the Plainwell store. Defendant and Hall were followed into the computer department. They left the department, but returned with two carts. One cart had clothing in it. Both suspects loaded the computer into the empty cart. Defendant paid for miscellaneous items and put a bag in the cart with the computer. After the couple exited the store, Rupp and Fisher identified themselves as loss prevention officers and asked the couple to come inside the store. Defendant began to walk fast and stated that he did not do anything. Defendant slammed Rupp into a truck two to three times. Fisher came running, and the two men took defendant to the ground and restrained him in handcuffs. Defendant received a cut to his head during the struggle.

Fisher also testified that he recognized Hall from an incident at the Plainwell store a week earlier. On that occasion, he was notified that a female was trying to push a computer out of the store. Hall stood by the computer and the cart, then left the cart, went outside, and met with defendant. Fisher observed defendant outside the store smoking. He could not identify what defendant was smoking, but noted that it smelled awful. After Hall approached defendant, the two went into the parking lot and drove off in a vehicle. Fisher came to the Cascade store a week later to retrain Rupp. Audits at the Cascade store revealed numerous inventory issues and losses. Fisher observed Hall and defendant. He alerted Rupp, and the two men split up to obtain a better vantage point.

Initially, the couple only had one cart. The two found a second cart in the jewelry department, unloaded its contents, and placed a computer in the second cart. The computer was a specialty item that contained additional hardware, such as a printer. Defendant lifted the box, but struggled with it, and Hall had to help him place the box in the cart. The couple proceeded to walk toward the front cash registers. Hall was pushing the cart with the computer, and defendant pushed the cart with the clothing. The couple stood behind each other in line, then Hall began to push the cart by an empty register. When a cashier arrived at the empty register, Hall waived defendant up to that line. Defendant paid for the clothing items and put a bag on top of the computer. When the couple exited the store, defendant walked right next to the cart as Hall pushed it out. Fisher and Rupp followed the couple out of the store and identified themselves as loss prevention officers. Hall let go out the cart and took a step back. Fisher promptly secured her to prevent her from running away. Defendant grabbed his bag and tried to walk away. Fisher observed defendant and Rupp in an altercation and aided Rupp in securing defendant. Defendant refused to provide a statement to Fisher and refused to sign a no trespass form.

Deputy Michael TenBrink of the Kent County Sheriff's Department was summoned to the Wal-Mart store in Cascade on December 30, 2000, where he made contact with defendant. Deputy TenBrink asked that the handcuffs on defendant be removed and requested a first aid kit. Defendant was advised of his constitutional rights and agreed to speak to Deputy TenBrink. Defendant stated that he could "beat this" because he did not do anything. Defendant stated that the couple aided an unknown woman, whom he could not identify, place a computer in her cart. Deputy TenBrink was unable to establish the existence of this mystery woman. He took an inventory of defendant's belongings. Defendant had $212 in cash and a lighter on his person when taken into custody. The computer sold for $998.

Deputy Brian Nelson of the Kent County Sheriff's Department was called to assist Deputy TenBrink with a retail fraud. Deputy Nelson made contact with Hall. Hall did not identify an unknown woman as the culprit of any shoplifting of the computer. Rather, she stated that the couple had stolen electronics equipment from Wal-Mart stores because defendant knew the system and how to get out of the store without making payment. The couple did not have jobs and resided in motels. To earn money, defendant sold the stolen items to people on the street.

Deputy Mandy Trevino of the Kent County Sheriff's Department was working the intake area of the county jail when Hall was brought in on a material witness warrant. Hall began screaming and crying after she saw defendant pass by. Defendant was being taken to the x-ray area. Deputy Trevino observed defendant gesture to indicate that he had a gun and pulled the trigger. Defendant said, "You ratted on me, bitch." When confronted by Deputy Trevino,

defendant denied the statement and the gesture. Defendant wanted to talk to Hall and asked the deputies to tell Hall to write him.

Lottie Sanders was working at the Cascade Wal-Mart on December 30, 2000. Sanders opened up a register. A woman was standing at the front of the store with a computer in the cart. The woman gestured to a man to come into Sanders' lane. Defendant paid for his merchandise with a gift card. Loss prevention officer Rupp approached Sanders and asked if the computer had been purchased. Sanders told him no, and loss prevention officers followed the couple out of the store. Sanders assumed that the computer had been paid for because the woman was standing in front of the store when she opened the register.

Defendant testified that he met Hall and fell in love with her. At that time, defendant was employed at a bakery. Because of his schedule, he was unable to spend time with Hall, and she would "take off" on defendant. To spend more time with Hall, defendant quit his job as a baker and obtained a job at a factory. Defendant knew that Hall had a crack cocaine habit. Defendant understood Hall's problem because he was a recovering drug addict. Defendant admitted to alcohol and cocaine use while with Hall, but testified that he briefly went to a program to recover. Defendant denied cigarette or marijuana use. Hall would be absent for days at a time on a cocaine binge. Despite her problems, defendant was in love with Hall.

On December 23, 2000, defendant went to see Scott Shadle in Morley, Michigan, then went to a party at the Ferris Inn in Big Rapids, Michigan. After the party, defendant decided that he should not drive so he stayed in a room at the hotel that evening. On December 24, 2000, defendant encountered Hall after a tire on his truck when flat, and he received assistance from one of Hall's friends. Defendant had not seen Hall since December 19, 2000.

On December 30, 2000, defendant and Hall went to a Meijer store where he purchased an engraved bracelet for her. Hall indicated that she wanted to purchase a present for her son. The two went to the Wal-Mart store. Defendant began to try on clothes to wear for his birthday. Hall also tried on clothing. Hall mentioned that she decided to purchase a computer for her son. Defendant learned that Hall had obtained a credit card from a friend she met when she was an exotic dancer. Defendant found a cart for the computer, and the couple placed it in the cart together. Defendant was waiting to pay for his items at a different register, when Hall waived him over to an open register. His purchase was placed in three or four bags. Defendant had a receipt for $61.35 for his purchase. Hall took a bag and placed it on the computer.

As the couple exited the store, a man approached to talk about the computer. The man grabbed defendant from behind and placed him in a chokehold. Defendant was brought into a room in the store where he was assaulted by Fisher. A manager was present during this assault. Fisher went through defendant's personal items, and defendant's gift card to Wal-Mart was stolen from him after this incident.

Defendant testified that he did not identify a mystery woman as the thief. His report of "a woman" referred to Hall. Defendant did not provide her name because he did not know which alias Hall was utilizing and did not know what kind of trouble she would be in. After being taken to jail, Hall did not contact defendant. A friend of defendant's gave birth to his baby on December 11, 2000. She advised defendant that Hall had taken his clothes and had moved in with a new boyfriend. After being in jail for six months, defendant saw Hall at the jail. She was

wearing his clothes. Defendant was upset and called her a "rat bitch." Although Hall had implicated defendant in other thefts at area Wal-Marts, defendant did not meet with police officers and was not charged with any other crimes. Defendant did not have the resources to hire private investigators and did not have specific information to clear his name.[1] Defendant knew that a fellow inmate at the jail would testify that he manufactured an alibi. Defendant testified that he refused to cut off the ring finger of the inmate's "old lady," which gave the inmate motive to lie about defendant.

Craig Lobdell testified that he took Hall to the Wal-Mart store on December 23, 2000. He testified that Hall offered to pay him $50 to drive her to the Wal-Mart in Plainwell. Hall explained that she only had a credit card that could only be used at that location. Lobdell waited in the car for Hall, but she returned without merchandise. Hall asked to be taken to the Wal-Mart store in Grand Rapids. Lobdell drove her to that location and waited in the car. Hall came out with a DVD player and a stereo in her cart. Hall asked if Lobdell knew anyone who wanted to purchase the stereo. In January 2001, Lobdell purchased cocaine from Hall and partied with her at a motel. Lobdell inquired about defendant's whereabouts. Hall stated that defendant was in jail, and she had "killed two birds with one stone." Lobdell acknowledged that he had contact with defendant while he was in jail for cashing a check that did not belong to him. He denied that he was lying to protect defendant and agreed to testify despite threats of perjury charges by the prosecutor.

Tony Allen Perez testified that he was in jail with defendant. Defendant bragged about stealing $200,000 worth of merchandise from stores. Perez knew business owners and was angry about the thefts. Additionally, Perez had provided police with information dating back to 1987, regarding a murder case. Perez began to write letters to the prosecutor with information stated by defendant. Defendant indicated that he was trying to get Scott Shadle to lie to discredit the testimony of the Plainwell security guard that defendant was with Hall on December 23, 2000. Perez acknowledged that he asked for favors, such as early release, in exchange for the information. However, he admitted that he did not receive anything from the police or the prosecutor, but continued to provide information anyway. In fact, Perez learned the locations that Hall frequented from Lobdell, and this information led to her arrest on the material witness bench warrant. Perez denied asking defendant to cut off someone's ring finger. The jury convicted defendant as charged.

Defendant first alleges that there was insufficient evidence to support his conviction. We disagree. When evaluating a challenge to the sufficiency of the evidence, a reviewing court must examine the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Questions of credibility and intent are properly resolved by the trier of fact, *In re Forfeiture of $25,505*, 220 Mich App 572, 581; 560 NW2d 341 (1996), and deference must be given to the jury's determination. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). A person is guilty of first-degree

[1] We note that the trial court did authorize funds for a private investigator, and the investigator was repeatedly referenced during trial.

retail fraud if he steals property offered for a price of more than $100 while the store is open to the public. *People v Ramsey*, 218 Mich App 191, 193; 553 NW2d 360 (1996); MCL 750.356c.

Defendant alleges that there was insufficient evidence to support his conviction because it was based on the "inherently incredible" testimony of Hall, and he was merely present while Hall pushed the computer out of the store. Where the question before the jury involves diametrically opposed versions of events, the test of credibility rests with the trier of fact. *Lemmon, supra*. Hall testified that it was defendant's idea to steal a computer to raise money for a birthday trip to Mount Pleasant. She testified that the couple had worked as a team and alternated pushing the stolen merchandise out of the store. Fisher testified that he observed, a week before this incident, Hall and defendant attempt to remove a computer from a Wal-Mart store located in another city. Lopez testified that defendant bragged of stealing thousands of dollars in merchandise from retail stores. To counter this testimony, defendant presented an alibi to demonstrate that he was not with Hall on December 23, 2000, during an attempted theft. Defendant and his witnesses attacked Hall's credibility, but the jury rejected defendant's version of events. *In re Forfeiture of $25,505, supra*. Accordingly, the challenge to the sufficiency of the evidence is without merit.[2]

Defendant next alleges that the trial court erred in admitting evidence of prior bad acts pursuant to MRE 404(b). We cannot conclude that the trial court's admission of this evidence was an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000). The evidence was offered for a proper purpose, to show a common plan or scheme, and was relevant to an issue of consequence. *Id*. The danger of unfair prejudice did not substantially outweigh the probative value of the evidence. *Id*. at 55-56. Defendant offered two witnesses at the MRE 404(b) hearing and one witness at trial to dispute his presence at the Wal-Mart store on December 23, 2000. This claim of error is without merit.

Defendant next alleges that he was deprived the effective assistance of counsel. We disagree. To succeed on a claim of ineffective assistance of counsel, the defendant must show that his counsel's performance fell below an objective standard of reasonableness that so prejudiced the defendant that he was denied the right to a fair trial. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id*. at 661-662. Defendant's blanket allegations of deficiency fail to meet this heavy burden.[3]

---

[2] Defendant also alleges that the jury's verdict was against the great weight of the evidence presented at trial. Defendant did not preserve this issue for appellate review by timely motion in the trial court. Therefore, we decline to address it. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997).

[3] For example, defendant concludes that the defense failed to produce witnesses with exculpatory information. At trial, defense counsel noted that the Wal-Mart manager was a potential witness. However, the testimony would address store policy, not the retail fraud charge. The trial court held that the information was not relevant. Additionally, while it is alleged that the defense failed to obtain a private investigator, the trial court authorized funds for an investigator. The blanket allegations of ineffective assistance are not supported by the record.

Lastly, defendant alleges that he was denied his right to a speedy trial. We disagree. A criminal defendant has a constitutional and statutory right to a speedy trial. US Const, Ams VI and XIV; Const 1963, art 1, § 20. To determine whether a defendant has been denied a speedy trial, the court must consider four factors: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). Speedy trial claims present constitutional issues that are reviewed de novo. *Id.*

On appeal, defendant asserts that a 236-day delay deprived him of his right to a speedy trial. However, this issue was not raised before and addressed by the trial court. Review of the lower court record reveals that trial was adjourned on four occasions, one adjournment chargeable to the prosecutor. The other orders of adjournment appear to be standard form scheduling orders that do not explain the basis or party responsible for the adjournment. Defendant also alleges that prejudice resulted from the delay due to "lost valuable witnesses" and "natural loss of recollection of events." However, it appears that the defense utilized any delay to prepare the case. Review of the lower court record reveals that the defense investigator was interviewing witnesses and compiling reports in July and August 2001. The last report of the investigator, dated August 10, 2001, was submitted to the prosecutor on August 20, 2001. The hearing regarding prior bad acts began on August 22, 2001. Thus, the defense preparation of the case continued until shortly before trial. Therefore, balancing the four applicable factors and based on the record available, we cannot conclude that defendant was deprived of his right to a speedy trial. *Mackle, supra*.

Affirmed.

/s/ Michael R. Smolenski
/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood